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No. 899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, NEW ORLEANS TELEVISION CORPORATION, CAPITOL BROADCASTING COMPANY, and AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT NEW ORLEANS TELEVISION CORPORATION IN OPPOSITION

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STATUTES AND REGULATIONS INVOLVED

In addition to Section 402 of the Communications Act of 1934, 48 Stat. 1093, as amended, 66 Stat. 718, 47 U.S.C. § 402, quoted in part in the petition for a writ of certiorari (pp. 3-4), this case also involves Section 1.361(a) of the Commission's rules and regulations, which provides in pertinent part, 47 C.F.R. § 1.361(a):

> "(a) Before Commission action on any application for an instrument of authorization, other than a license pursuant to a construction permit, any person may file informal objections to the grant. * * *"

QUESTION PRESENTED

Whether any person may, as a matter of statutory right, intervene and participate in an appeal from an order of the Federal Communications Commission, where the statute, in defining the procedure for an "interested person" to secure status as a party intervenor, declares:

> "Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission shall be considered an interested party."

47 U.S.C., § 402(e) and the circumstances are:

(1) The person seeking intervention would not be "aggrieved" nor would its interest be "adversely affected" by a *reversal* or *modification* of the order complained of, because it seeks to intervene *in support* of the appeal and *in favor* of reversal or modification;

(2) While claiming a general "interest" in the subject matter of the appeal, the person seeking intervention has not been "aggrieved" nor has its interest been "adversely affected" by the Commission's action under review; and

(3) The person had been permitted to file pleadings before the Commission under a Commission rule which provides that "any person may file informal objections to the grant" of an application of the nature granted, 47 C.F.R., § 1.361(a), but seeks to intervene on appeal as an "interested person."

STATEMENT OF THE CASE

In a general rule making proceeding in Docket No. 13340, the Federal Communications Commission adopted a policy that it would waive those requirements of its rules and regulations which specified minimum separations between television stations operating on the same channel, under special circumstances in a limited number of specified major markets of the United States. *Interim Policy on VHF TV Channel Assignments*, 21 Pike & Fischer Radio Reg. 1695 (1961). A detailed procedure was defined to be followed by any newly authorized station to suppress radiation in the direction of an existing co-channel station "to the extent necessary to provide equivalent protection to that which the existing station would enjoy if the new station were operating with full power at the standard minimum separation." 21 Pike & Fischer Radio Reg. at 1709. On a petition for reconsideration filed by the respondent New Orleans Television Corporation, the Commission determined that New Orleans would be added to its list of communities where reduced separations would be considered, since a Channel 12 station at regular spacings could only be placed 35 miles down river from New Orleans. 21 Pike & Fischer Radio Reg. at 1710f. Since Channel 12 was already assigned to New Orleans, the Commission stated no further rule making would be required, and it would "entertain an application to modify the outstanding construction permit for Channel 12 and interested parties may respond to the application." *Ibid.*

Petitioner Association of Maximum Service Telecasters, Inc. [not to be confused with the National Association of Broadcasters, the national trade association for radio and television licensees], is the repre-

sentative of a group of "approximately 150 television stations" (thus comprising less than one-fourth of the 570 commercial and 68 non-commercial television stations in the United States), which opposed the reduced-separation policy and equivalent-protection procedure adopted in the Docket No. 13340 general rule making proceeding.

Acting in response to the Commission's invitation in Docket No. 13340 and in strict conformity with its specifications and requirements, the respondent New Orleans Television Corporation, which held a permit for a station at regular spacings at a site 35 miles from New Orleans, filed an application to move its transmitter site to New Orleans at reduced spacings (FCC R. 2, 17). A petition to deny was filed by the respondent Capitol Broadcasting Company, the licensee of a co-channel station at Jackson, Mississippi (FCC R. 68-94), and a petition to designate the application for hearing by the permittee of an unconstructed Channel 11 station at Houma, Louisiana (which has not participated in appellate proceedings) (FCC R. 62-67). The petitioner Association (AMST) filed "Objections * * * to Grant" (FCC R. 110-115) under Section 1.361(a) of the Commission's rules and regulations, 47 C.F.R., § 1.361(a), which provides that "any person may file informal objections to the grant" of an application for an instrument of authorization, with one exception not here pertinent. Over objections by the respondent New Orleans Television Corporation that the Association was not a "party in interest," the Commission concluded, "we believe it appropriate to allow *the limited participation sought* by AMST" (emphasis added), *New Orleans Television Corp.*, 23 Pike & Fischer Radio Reg. 1113, 1115 (1962).

By memorandum opinion and order released on July 31, 1962, the Commission considered and rejected the contentions of the pleadings filed in opposition, and granted without hearing the application of New Orleans Television Corporation for modification of its construction permit to specify a transmitter site at reduced separations, with detailed conditions for affording equivalent protection to the co-channel Jackson station. *New Orleans Television Corp.*, 23 Pike & Fischer Radio Reg. 1113 (1962).

Pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C., § 402(b)(6), the respondent Capitol Broadcasting Company, the licensee of the co-channel Jackson station, filed an appeal from the order of the Commission granting the New Orleans authorization before the United States Court of Appeals for the District of Columbia Circuit (R. 109). Notices of intention to intervene were separately filed by the respondent New Orleans Television Corporation, by the respondent American Broadcasting-Paramount Theatres, Inc., and by the petitioner Association of Maximum Service Telecasters, Inc.

Motions to strike the petitioner Association's notice of intention to intervene were filed by the Commission and by New Orleans Television Corporation, on the ground that the petitioner would not be aggrieved or its interest adversely affected by reversal or modification of the Commission's order, and thus was not an "interested party" within the definition of Section 402(c) of the Communications Act governing intervention, and also on the ground that its asserted interest as an Association of limited membership in "high technical quality" television service to the public

did not establish that it was "aggrieved" or its interest was "adversely affected" by the Commission's grant sufficiently to support intervention as an "interested person" under Section 402(e) of the Act (R. 33-36, 44-49).

On November 16, 1962, a division of the United States Court of Appeals granted the motions of the Commission and New Orleans Television Corporation, and dismissed without opinion the notice of intention to intervene of the Association (R. 66). A "Petition for Reconsideration and/or Reconsideration En Banc" was filed by the Association, was opposed by the Commission and by New Orleans Television Corporation, and was denied without opinion by orders entered January 10, 1963, by the division of the Court and by the Court en banc (R. 93, 94).

On January 30, 1963, the Association filed with the United States Court of Appeals a "Motion for Leave to File Brief Amicus Curiae and to Participate in Oral Argument." On objection by New Orleans Television Corporation, the Court granted leave to the Association to file a brief as amicus curiae but denied its request for leave to participate in oral argument. The filing of briefs before the United States Court of Appeals is being completed, and oral argument before the Court is scheduled for April 19, 1963.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI FAILS TO ESTABLISH AN ADEQUATE BASIS FOR CONSIDERATION BY THIS COURT

No important question of federal law is presented which has not been, but should be, settled by this Court. The provision for intervention, with its antecedents,

has been in effect for thirty-three years without challenge. Section 402(c) of the Communications Act of 1934, as amended, is derived from a 1930 amendment of Section 16 of the Radio Act of 1927. See Public Law No. 494, 71st Cong., 2d Sess., 46 Stat. 844 c. 788. The circumstance that petitioner's interpretation has never been heretofore litigated suggests that the limitations upon intervention set forth in the Communications Act are clear and plain upon their face, and that there is no great precedent potential in the Court's dismissal of petitioner's intervention, since it merely represents an application of existing law.

That the United States Court of Appeals below has conclusively determined on three occasions without dissent, twice by a division of the Court and once by the Court en banc, that petitioner had no standing to participate of right as a party intervenor in the appeal, and found it unnecessary to set forth the grounds for its disposition, further suggests that no substantial question was raised.

II. THE DISMISSAL OF PETITIONER'S NOTICE OF INTENTION TO INTERVENE WAS CLEARLY CORRECT UNDER THE TERMS OF THE APPLICABLE STATUTE

A. Petitioner Would Not Be Aggrieved Nor Would Its Interest Be Adversely Affected By Reversal Or Modification

Section 402(c) of the Communications Act of 1934, as amended, is carefully drawn to limit intervention only to "any interested person," and to define with precision what constitutes such an interested party:

> "Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with

> proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party."

Legislative history similarly reflects the intention of the Congress to limit intervention under Section 402(b) to those who support the order complained of, i.e., those "who would be aggrieved or whose interest would be adversely affected by a *reversal* or *modification* of the order" (emphasis added). The House Committee Report on the 1952 Amendments to the Communications Act, H.Rept. No. 1750 (82nd Cong., 2d Sess.), 1952, stated:

> "Subsection (e) provides that within 30 days after the filing of any such appeal any interested person may intervene and participate in the proceedings by filing with the court a notice of intention to intervene and a verified statement of the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. An 'interested party' is defined as any person who would be aggravated [sic] or whose interest would be adversely affected by a reversal or modification of the order of the Commission which is complained of."

In light of the specific statutory language defining intervention under Section 402(e), other provisions of other statutes permitting broader intervention in different circumstances (e.g., in appeals from rule making actions, where a much larger number of persons may be directly affected) reflect a different Congressional purpose and are here inapposite.

B. Petitioner Was Not "Aggrieved" Nor Was Its Interest "Adversely Affected" to Support Intervention

Judicial procedure on appeal is not so casual and indiscriminate as to permit every intrusion into proceedings before the Court, but requires a showing of "interest" to support intervention and participation. Under Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C., § 309(c), "A 'party in interest' is one who is 'aggrieved or whose interests are adversely affected' (§ 402(b))." *Metropolitan Television Company* v. *United States*, 95 U.S. App. D.C. 326, 221 F. 2d 879, 880 (1955); cf. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). The statutory language of Section 402(e) of the Act utilizes the same language in defining an "interested party" with standing to intervene upon appeal.

The status of petitioner as an association of a limited number of television stations, and its asserted interest in the continuation of television service to the public of high technical quality, manifestly did not establish to any degree that it was "aggrieved" or that its interest would be "adversely affected" by the Commission's grant of the New Orleans application. A television station in Rochester, New York, or Kansas City, Missouri, manifestly can have no substantial or direct interest in a television assignment in New Orleans; their combination with others into a group for some special purposes such as intervention can operate to confer no greater rights. If a member station is directly affected, it has an adequate remedy in its own right to appeal, as exercised by the co-channel Jackson station licensee.

The Association's participation in Docket No. 13340 was in a general rule making proceeding open to all

members of the public. Allowance of "the limited participation sought" by the Association in the Commission's consideration of the New Orleans application was based upon a rule of procedure of the Commission, 47 C.F.R., § 1.361(a), likewise permitting any member of the public to file informal pleadings. Certainly it would be a most curious inversion of the administrative process to authorize a person who was granted leave to file objections as any member of the public might do to acquire standing to prosecute an appeal upon the denial of its objections.

Standing to intervene in a judicial proceeding is a matter for judicial determination. The clerical function performed in the office of the Commission of giving notice to the Association that an appeal had been filed by the co-channel Jackson licensee obviously could confer no standing to intervene where it did not otherwise exist. The United States Court of Appeals properly dismissed the Association's notice of intention to intervene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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